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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1244

JAMES W. BRUNDAGE, *Petitioner*,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

JAMES W. BRUNDAGE, *Petitioner,*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

James W. Brundage, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Claims, App. A, *infra,* is reported at 205 Ct. Cl. 502, 504 F.2 1382, 1974. The order denying plaintiff's motion for rehearing and for rehearing en banc was issued January 10, 1975, 206 Ct. Cl. — (1975), Appx. B. The order denying the

motion of the Bar Association of the District of Columbia to file a brief amicus curiae was issued January 10, 1975, 206 Ct. Cl. — (1975), Appx. C.

JURISDICTION

The judgment of the Court of Claims was entered on October 23, 1974. The plaintiff's motion for rehearing was denied on January 10, 1975.

The jurisdiction of this Court is invoked under 28 USC 1255(1).

QUESTIONS PRESENTED

1. Whether the Court erred in holding that the doctrine of laches applied in the instant case and required the granting of defendant's motion for summary judgment and denying plaintiff's motion for summary judgment.

2. Whether the Court erred in denying plaintiff's motion for rehearing and in not accepting plaintiff's suggestion of a rehearing en banc.

STATUTES

28 USC 2501—Statute of Limitations

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Rule 7(b)

. . . . A majority of the judges in regular active service may order that a rehearing en banc be granted. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance or difficulty.

STATEMENT

Plaintiff served on active duty in the United States Air Force as a regular officer for over 15½ years until he was discharged on March 31, 1969 by reason of being passed over for promotion to the grade of *permanent*[1] Major. He claims the passover (i.e. non-selection) was in error and that he should have been promoted to Major, *permanent,* and retained on active duty for at least an additional four years, to qualify for retirement based on 20 years of active service. After being passed over for selection for *temporary* promotion and once for *permanent* Major, plaintiff was selected for promotion to the *temporary* grade of Major by a board which met on July 8, 1968. One month later a board for *permanent* Major met to consider plaintiff and others. Plaintiff was not so selected, and by reason of failure for selection to the grade of *permanent* Major he was, as required by law, discharged from active duty.

The board for *permanent* promotions met in August 1968. It is plaintiff's contention that, due to the interval between the date of selection for *temporary* Major (the board met July 8, 1968 and the list of selection was published August 27, 1968) and the convening of the board for *permanent* Major, August 5, 1968, the permanent board had no knowledge of plaintiff's selection for *temporary* Major, i.e. some time be-

[1] As we will in the recital of facts and argument deal with permanent and temporary promotions, each of which has definite connotations, we shall underscore those words throughout, to emphasize the significance of each.

tween July 8, 1968 and August 27, 1968. Such a fact is of material significance in passing upon plaintiff's qualifications and entitlement to promotion to the grade of *permanent* Major.

Plaintiff filed his petition December 8, 1972, three years and eight months after his discharge from active duty. However, during this interval he prosecuted his claim as diligently as the factual situation reasonably permitted. He applied for relief to the Air Force Board for the Correction of Military Records on October 11, 1968; this was denied November 19, 1968. He sought Congressional assistance in January of 1969, later to another Congressman in October of 1969, and to others during the years 1970 and 1971. All were without any degree of success. He retained a Connecticut attorney in May of 1971 who conducted correspondence with Congressmen and with the Air Force. Present counsel were retained on January 31, 1972 and during that year, after extensive investigation, located and contacted certain witnesses. Handwriting experts submitted their opinions and suit was filed December 8, 1972. All are set forth in detail in an appendix to plaintiff's motion for rehearing. In substance, this recital establishes that the delay is accounted for in three general areas:

(1) a protracted correspondence seeking relief from Congressmen;

(2) time required in ascertaining and locating witnesses;

(3) securing writing exemplars and obtaining an opinion from an expert.

While it must be recognized that time consumed in seeking Congressional relief or applying to the Cor-

rection Board does not operate to toll the statute of limitations, or, in this case, the delay requirement of laches, the fact that plaintiff is a layman dealing with a rather complicated field of law, lends support for a claim that a considerable degree of tolerance must be allowed.

Application to a Congressman in connection with personal problems with government agencies is a matter of right (10 USC 1034), of common knowledge, and a universally accepted practice; thus plaintiff was acting in a reasonably prudent and justifiable manner and he cannot be faulted in this delay. Further, in view of the secrecy that is inherent in selection board proceedings, plaintiff likewise cannot be criticized. Finally, it is obvious that difficulties will be experienced in seeking data and names and locations of material witnesses. All of these factors establish a reasonable accounting for the over three year delay.

On November 22, 1974, plaintiff timely filed a motion for rehearing and asked that the full Court hear the motion.

The Bar Association of the District of Columbia filed a motion for leave to file a brief amicus curiae on December 16, 1974.

The Court on January 10, 1975 denied both motions (Appx. B and C).

REASONS FOR GRANTING THE WRIT

The principle of laches as applied to military pay cases, was allowed in the Court of Claims cases dating back to 1923, *Plunkett* v. *United States,* 58 Ct.Cl. 359 (1923) and *Chamberlain* v. *United States,* 66 Ct.Cl. 317 (1928) to which the Court made reference in the case

of *Cason* v. *United States,* 198 Ct.Cl. 650, 461 F.2d 784 (1972) hereinafter referred to as *Cason I.* The decision was either forgotten or abandoned in military pay cases by the defendant and the courts for almost 50 years until it was resurrected in *Cason I, supra.* This was so revolutionary that a rehearing was granted and the Court in *Cason* v. *United States,* 200 Ct.Cl. 424, 471 F.2d 1225 (1973) referred to as *Cason II,* noting the extensive period of non use and the unfamiliarity of the *Plunkett* holding, *supra,* required a reversal of the *Cason I* decision, with the caveat that *Cason I* would have application to future cases (page 431). As plaintiff's petition was filed only six months after *Cason I* and six weeks prior to *Cason II, supra,* plaintiff contends the same dispensation should have been granted him. Further, there are potentially a large number of military pay claimants and thus the matter is of significant interest, particularly as is evidenced by the application of The Bar Association of the District of Columbia to file a brief amicus. Further, plaintiff contends that the Court erred in the application of principles of laches to the instant case and, finally, the denial of the motion for reconsideration, en banc, and the denial of the application for the filing of a brief amicus was not in compliance with the rules relating to rehearing.

SPECIFIC REASONS

1. Prospective Application of Cason Decision

Insofar as the time frame is concerned in the matter of delay in laches, plaintiff is in substantially the same situation as was *Cason, supra,* in that for the first several years following his release from military service in 1969 he was relying on the existing practice that

laches did not apply to military pay cases. The Court saw fit, in *Cason II,* to make due allowance for this reliance and refused to apply laches; applying the same concept, plaintiff herein contends that prospective application of *Cason I,* coupled with the admonition expressed in *Cason II, supra,* has no application to the instant case.

2. A Matter of General Interest

The legal principles involved in the instant case and in other military pay cases is, by reason of the vast number of personnel in the military service, of great interest to a large number of the citizenry of the United States. This is particularly evidenced by the fact that The Bar Association of the District of Columbia saw fit to seek permission to file a brief amicus. Thus the plaintiff contends that the points he is raising in his application for certiorari are of sufficient general interest to warrant consideration by this Honorable Court.

3. Application of Principles of Laches

Congress has seen fit to permit actions to be brought against the United States within six years of the accrual of the cause of action as is set forth in the statute of limitations, 28 USC 2501. The doctrine of laches in its operation thus in effect annuls the statutory provisions in that a period of less than six years is still considered a bar to the prosecution of plaintiff's action. This abrogation of a statutory enactment, in effect, by judicial fiat, accordingly should be asserted with the greatest of caution and, accordingly, various factors dealing with delay and prejudice, the two essential elements of laches, are of tremendous concern and significance.

As to *delay,* plaintiff respectfully asks the Court to significantly note that prior to *Cason I, supra,* plaintiff was not put on notice of the need to file his action in the Court of Claims by any date other than that prescribed by the statute of limitations.

Plaintiff was here involved in a field of law and military regulations which is completely foreign to the layman. Further, he has experienced considerable difficulty in ascertaining relevant facts and in locating essential witnesses, particularly in view of the fact that military personnel are located at distant points in the United States and world wide. While seeking Congressional assistance may not justify a delay, the fact remains that as a matter of common knowledge, this is an authorized avenue the layman in practice has generally used.

This is substantially in accord with principles stated in *Northern Pacific Railway Company* v. *Boyd,* 228 U.S. 482, 33 S.C. 554 (1913):

> "But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the non-action of the complainant operated to damage the defendant, or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time." (Pg. 562).

In *O'Brien* v. *United States,* 148 Ct.Cl. 1 (1960) the Court noted:

> "However, laches, unlike the statute of limitations, is a flexible concept based on fairness and applied in the discretion of the court. The cause of the delay, the hardship to the defendant, the nature

> of the relief, and other factors must all be considered in determining its application." (Pg. 3).

and continued:

> "Congress has specifically provided a six-year statute of limitations for claims asserted in this court. Ordinarily a claimant has the full statutory period. It is only where some great injustice would be done the defendant by so long a delay by the claimant that the doctrine of laches should be set up to defeat consideration of the claim on the merits. The equities on both sides should be carefully weighed, and it should be clear that they weigh heavily on the side of the defendant before the court refuses to hear a case because of a delay of less than the statutory period. How the equities are to be balanced in one case is but little guide in another case. Each case must be considered in the light of its own facts and in the light of the relief sought." (Pg. 4).

See also *Aviles* v. *United States,* 151 Ct.Cl. (1960).

The above factual recital and observation materially influenced the delay factor.

With reference to the other element of laches, *prejudice,* the thrust of the defendant's contention here is that it would be prejudicial to the government in that two salaries or wages would have to be paid during the period in question. Here, however, we must take into account the fact that in military pay cases the courts require an offset of the civilian earnings for the period concerned, thus materially mitigating the damages.

Defendant has the burden of establishing prejudice and damage by reason of the delay, but likewise, plaintiff suffers in that due to the lapse of time memories fade or become foggy and documents essential to estab-

lish his claim may be incapable of production or otherwise be unavailable which would militate against his claim.

4. Non-Compliance with Court of Claims Rules

Rule 7(b) of the Court of Claims makes provision for a rehearing before the entire Court subject to certain limitations. Plaintiff contends that his application for such an en banc hearing is within the exceptions, i.e. (1) to maintain uniformity of its decisions, or (2) of exceptional importance. The revolutionary decision in *Cason I, supra,* in the opinion of the Court, warranted a reconsideration as expressed in *Cason II.* For the reasons indicated above, plaintiff is substantially in the same situation as *Cason;* that coupled with the tremendous importance in the application of principles of laches to a large number of the population would clearly require reconsideration by the Court of Claims as sought by the plaintiff.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 442-72

(Decided October 23, 1974)

JAMES W. BRUNDAGE v. THE UNITED STATES

Maurice F. Biddle, attorney of record, for plaintiff. *Thomas H. King,* of counsel.

John W. Showalter, with whom was *Assistant Attorney General Carla A. Hills,* for defendant. *Raymond B. Benzinger,* of counsel.

Before DURFEE, *Senior Judge,* NICHOLS and KASHIWA, *Judges.*

On Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment

DURFEE, *Senior Judge,* delivered the opinion of the court:

Plaintiff served on active duty in the United States Air Force as a commissioned officer until he was discharged on March 31, 1969, as a result of having twice been passed over for promotion to the grade of permanent Major. By this action he asserts a claim for the pay of a Major with over fifteen years of service, to be computed from the date of his discharge. Plaintiff also prays for an order directing the Air Force to amend its records to show that he was promoted to permanent Major.

Plaintiff was chosen for promotion to the grade of temporary Major by a selection board (hereinafter "Temporary Major Board") which met on July 8, 1968. One month later, on August 5, 1968, another selection board (herein-

after "Permanent Major Board") was convened to consider the promotion of eligible officers. Plaintiff's records were considered by the Permanent Major Board, but he was not selected for promotion to permanent Major.

On October 11, 1968, prior to his discharge, plaintiff applied to the Air Force Board for the Correction of Military Records seeking to have expunged from his files the August 5, 1968 non-selection to the grade of permanent Major. It was plaintiff's contention that, due to administrative error, the permanent Major Board had not been apprised of his selection to the grade of temporary Major, one month earlier, by the Temporary Major Board. Plaintiff maintained that if the Permanent Board had been informed of this "significant factor," it would have in all probability promoted him to permanent Major. By letter of November 19, 1968, the Correction Board denied plaintiff's application for failure to establish a showing of probable error or injustice. Plaintiff's August 5, 1968 non-selection for promotion, coupled with a previous deferral of promotion on November 19, 1966, resulted in his discharge from the Air Force on March 31, 1969.

Plaintiff filed suit in this Court on December 8, 1972. Thereafter, on January 26, 1973, he moved the court to suspend the proceedings to permit his reapplication to the Air Force Board for the Correction of Military Records. By letter of February 1, 1973, plaintiff requested the Correction Board to reconsider his case. He alleged, once again, that the records considered by the August 5, 1968 Permanent Major Board were incomplete in that they did not reflect his previous selection for promotion to temporary Major. Plaintiff's Officer Selection Brief, a document which was before the selection board, had been annotated with the printed word "SELECTED," under the column headed "PROMOTION STATUS," after the term "TEMP." According to plaintiff's theory, however, this

entry was made by one Colonel Worthington, who was in charge of the Selection Board Secretariate, *after* the Permanent Major Board had made its selections, and thus the Board was unaware of plaintiff's previous promotion to temporary Major.

On August 6, 1973, the Air Force Correction Board denied plaintiff's application for reconsideration. Plaintiff thereupon moved to lift the suspension of proceedings in this court, and he filed a supplemental pleading alleging, once again, that the action of the Air Force Correction Board in denying his application without a hearing was arbitrary and capricious.

The United States, in support of its motion for summary judgment, argues, *inter alia,* that plaintiff's claim for promotion to the rank of permanent Major is barred by the doctrine of laches, and it fails to state a claim upon which relief may be granted, and that the actions of the Air Force Board for the Correction of Military Records were not arbitrary or capricious.

Since it is our conclusion that plaintiff's claim is barred by laches, we shall not discuss or pass upon its merits.

Laches is a "fairness" doctrine by which relief is denied to one who has unreasonably and inexcusably delayed in the assertion of a claim. Failure to act promptly will operate as a bar to recovery where the delay results in injury or prejudice to the adverse party. The doctrine of laches is based upon considerations of public policy, which require, for the peace of society, the discouragement of stale demands. It recognizes the need for speedy vindication or enforcement of rights, so that courts may arrive at safe conclusions as to the truth. As an equitable defense, laches is applied apart from, and irrespective of, statutes of limitations.

The doctrine of laches has long been given recognition and effect in this court.[1] Numerous Court of Claims cases have applied the bar of laches where plaintiffs have asserted demands for back pay or for reinstatement because of illegal discharge from civilian Federal service. *See e.g., Grisham* v. *United States,* 183 Ct. Cl. 657, 392 F. 2d 980, *cert. denied,* 393 U.S. 843 (1968); *Jackson* v. *United States,* 179 Ct. Cl. 29, *cert. denied,* 389 U.S. 985 (1967); *Gersten* v. *United States,* 176 Ct. Cl. 633, 364 F. 2d 850 (1966); *Bovard* v. *United States,* 160 Ct. Cl. 619, *cert. denied,* 374 U.S. 830 (1963); *Alpert* v. *United States,* 161 Ct. Cl. 810 (1963).

The judgment in a recent military pay case holding plaintiff's claim barred by laches, *Cason* v. *United States,* 198 Ct. Cl. 650, 461 F. 2d 784 (1972) (hereinafter *Cason I*), was subsequently vacated at 200 Ct. Cl. 424, 471 F. 2d 1225 (1973) (hereinafter *Cason II*). The decision in *Cason I* that plaintiff's claim was defeated by the doctrine of laches relied upon two old cases of this court, *Plunkett* v. *United States,* 58 Ct. Cl. 359 (1923), and *Chamberlain* v. *United States,* 66 Ct. Cl. 317 (1928), *cert. denied,* 279 U.S. 845 (1929), as authority for the proposition that the defense of laches was applicable to military, as distinguished from civilian, pay cases. On plaintiff's motion for reconsideration, the court held in *Cason II* that laches should not apply because defendant therein had made no attempt to substantiate that it was in any specific manner prejudiced by plaintiff's delay. In addition to this, the court considered decisive the unfairness to plaintiff of dismissal on the ground of laches in reliance on precedents which were obscure and more than 40 years old. "However," it was advised, "parties before this court in the future will take this case as notice that military pay cases are not *per se* exempt from application of the doctrine of laches." *Cason*

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[1] It will be observed that laches is an affirmative defense to be pleaded under the Rules of this court. *See* Rule 37(b).

II, supra, at 431. The court further observed in *Cason II* that plaintiff's delay of four years before bringing suit was entirely too long, and that with a minimum showing of injury, it would have mandated application of laches except for the desuetude factor.

There can be no dispute after *Cason I* and *II* that the doctrine of laches is applicable to military pay suits.[2] This much plaintiff concedes. It is his contention, however, that neither of the constituents of laches, lack of diligence on plaintiff's part or resulting prejudice to defendant, is demonstrated by the facts of this case. We disagree.

A period of three years and eight months elapsed between plaintiff's discharge, at which time his claim accrued, (*Mathis* v. *United States,* 183 Ct. Cl. 145, 391 F. 2d 938 (1968)), and the filing of suit herein. This and other courts have sustained the defense of laches for far shorter periods of delay in cases where civilians in government service have sought to challenge the legality of their removals. *See* authorities, with parenthetical delay periods indicated, cited in *Alpert* v. *United States, supra,* at 820-21. A period of only eleven months delay was deemed sufficient to preclude plaintiff's recovery in *Norris* v. *United States,* 257 U.S. 77 (1921).

In *Cason II* the court indicated that certain differences between civilian and military pay cases must be taken into account when applying the principle of laches. One relevant difference revealed was that a civilian's administrative relief is mandatory, while military personnel have available only administrative remedies which are permissive in nature. Noting that the pursuit by a civilian employee of mandatory administrative remedies defers the

[2] *See Bender* v. *United States,* 201 Ct. Cl. 865, *cert. denied,* 414 U.S. 1022 (1973) (Order), a military pay case in which plaintiff's claim was dismissed on grounds of laches.

running of both limitations and laches (citing *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied*, 373 U.S. 932 (1963); *Keeney* v. *United States*, 150 Ct. Cl. 53 (1960)), but that the pursuit by military personnel of optional or permissive administrative relief will not serve to defer or toll the running of limitations (citing *Mathis* v. *United States*, 183 Ct. Cl. 145, 391 F. 2d 938 (1968); *Kirk* v. *United States*, 164 Ct. Cl. 738 (1964)), the court in *Cason II, supra*, at 432, opined:

> • • • If, as our original opinion intimated, [permissive administrative remedies] do not suspend laches either, resort to them is discouraged, perhaps penalized. Yet they were created with the object of providing remedies less costly to both sides, and more expeditious than litigation is. The military should have a fair chance to correct their mistakes themselves. We think that in military cases it would be improper and erroneous for us to apply laches in a way that would spur the commencement of suit as soon as discharges become final, before the results of seeking administrative relief are known. • • •

Plaintiff asks us to be mindful of the above-stated considerations, and he urges us to excuse his procrastination for a period of more than three years and eight months because during that time (1) he sought Congressional assistance to no avail, (2) he employed an attorney, who corresponded with the Air Force in an effort to obtain pertinent documentary material considered necessary for the prosecution of this case, and (3) he submitted an application for reconsideration to the Air Force Correction Board on February 1, 1973, after filing suit in this court.

The pronouncement by way of considered dictum in *Cason II, supra*, at 432, that it would be improper and erroneous to apply laches in military pay cases so as to discourage resort to permissive administrative remedies, can give no consolation to plaintiff herein, for we fail to see how the enforcement of laches in the instant case would in any way have the

effect of inhibiting or deterring military personnel from pursuing optional administrative remedies. Plaintiff's first attempt to nullify his non-selection for promotion to permanent Major was by submission of an application, on October 11, 1968, to the Air Force Correction Board. That application was denied on November 19, 1968, before plaintiff was discharged from the service. Plaintiff had thereby availed himself of the opportunity to pursue administrative relief even before his claim in this action accrued. It was not until more than four years after the Correction Board's denial of plaintiff's application, and not until after he filed suit in this court, that plaintiff again requested the Correction Board, on February 1, 1973, to reconsider his case.

Plaintiff tries to justify his tardiness, but his explanations fail to excuse either the protracted interval between applications to the Correction Board (a period of more than four years), or the delay in filing suit once his claim in this action accrued (a period of more than three years and eight months). The seeking of Congressional assistance is not a suitable sanction for delay; and, of course, an appeal for help to a member or members of Congress is not the pursuit of a permissive *administrative* remedy which the court in *Cason II, supra*, at 432, sought to encourage. The hiring of an attorney, who corresponded with the Air Force in an effort to obtain documents pertinent to the prosecution of this case, is likewise an insufficient ground or reason to justify plaintiff's lack of diligence. Even if this kind of activity could suffice as a warrant for delay, plaintiff's attempt to thereby establish diligence would nevertheless be utterly inadequate. He tells us that "it was not until August 16, 1971 that the Air Force released the requested material." But, as the Government points out, and as the record substantiates, plaintiff's request for this information to the Secretary of the Air Force was not made until July 16, 1971, more than two years after his discharge. Having obtained the requested documents,

plaintiff then waited another fifteen months before filing his petition in this action.

Plaintiff has established no extenuating circumstances sufficient to render his claim invulnerable to the defense of laches. We are compelled to the conclusion that he unreasonably and inexcusably delayed for a period of three years and eight months before asserting his rights in the commencement of this litigation. Of course, delay alone does not constitute laches. Some showing of prejudice by defendant should be made for it to prevail under the doctrine, although "* * * the longer the delay the less need there is to search for specific prejudice and the greater the shift to plaintiff of the task of demonstrating lack of prejudice. * * *." *Cason II, supra,* at 431; *accord, Grisham, supra,* at 663; *Gersten, supra,* at 636.

Prejudice to the Government manifestly results when a claimant for back pay unreasonably delays in the assertion of his rights, thereby obliging the Government to pay two salaries, over a long period of time, when it has received the services of only one person. This court has held, in numerous civilian pay cases, that such prejudice is sufficient for the enforcement of laches. *See e.g., Grisham, supra; Gersten, supra; Alpert, supra; Albright* v. *United States,* 161 Ct. Cl. 356 (1963); *Bovard, supra; Miner* v. *United States,* 143 Ct. Cl. 801 (1958); *Dion* v. *United States,* 137 Ct. Cl. 166 (1956). There appears to be no reason why the principle enunciated in these civilian pay cases should not be applied with equal force in military pay suits. *See Plunkett, supra; Chamberlain, supra.* It is reasonable to presume that another officer or officers have held plaintiff's position since he left the service, discharging the duties formerly performed by him, and drawing the salary plaintiff claims should have been paid to him. *See Blackmar* v. *United States,* 173 Ct. Cl. 1035, 1046, 354 F. 2d 340, 347 (1965); *Bovard, supra,* at 622. However, even if no one was selected to replace plaintiff, or to perform the tasks

that once were his, a recovery by plaintiff would require the Government to pay him the salary of a Major for a period of over five and a half years,[3] during which time no work was done, and during which time he had ample opportunity to fully assert his claim.

There is also some indication that the Government's defense has been impaired by the belated prosecution of plaintiff's claim. The search for truth is always imperiled with the passage of time. Memories fade and documentary evidence is sometimes lost or destroyed. Plaintiff's theory, which he fully expounded for the first time in his February 1, 1973 reapplication to the Correction Board, was that the Permanent Major Board was unaware of his prior promotion to temporary Major, and that Colonel Worthington, in an effort to cover up an administrative error, annotated plaintiff's Officer Selection Brief subsequent to the selection board's consideration of that document. All of this, of course, is denied by the Government. By the time plaintiff reapplied to the Correction Board, Colonel Worthington was totally unable to recollect the specific facts surrounding plaintiff's case,[4] and plaintiff's scoring ballot, another document that was before the Permanent Major Board, had been routinely destroyed. Although this case is before us on the parties' cross motions for summary judgment to review the administrative record, plaintiff requested at oral argument the opportunity to go to trial for the resolution of what appears to be material issues of fact. The loss of

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[3] Plaintiff seeks active duty pay from his discharge date, March 31, 1969, until the date of judgment entered herein.

[4] On July 11, 1972, plaintiff's counsel wrote to Colonel Worthington for information as to his involvement in annotating plaintiff's Officer Selection Brief. In reply, by letter of July 17, 1972, Colonel Worthington stated: "As you must realize, it is almost impossible to recall such an event as you describe in your letter four years later." (Plaintiff's Exhibit 5).

memory of Colonel Worthington and other witnesses, and the destruction of pertinent documentary evidence—both occasioned by plaintiff's delay—prejudices the Government by hindering its presentation of an effective defense. Defendant is now unable to establish with certitude, as perhaps it once could have, that the Permanent Major Board had been apprised of plaintiff's prior promotion to temporary Major.

Writing for the majority in *Cason I*, Judge Nichols indicated a further policy consideration distinctly apposite in cases such as this, where plaintiff, after a long period of delay, challenges the procedural regularity of the actions of Government officials:

> * * * others have interests the court needs to consider, even though not parties nor represented by counsel. These are the officials whose procedures were allegedly defective. Their impartiality, competence, or devotion to law are impugned more or less, and they are subjected to some harassment that interrupts their performance of public duty. Some peace and serenity they must surrender as a price of being in public employment, but at least they are entitled to this: that they should be allowed to defend and explain their acts when their recollection is fresh and relevant evidence has not disappeared, for their own reputations as well as to protect the public fisc. [*Cason I, supra*, at 658.]

Plaintiff's allegations call into question the competence and veracity of Air Force officials. It is manifestly unfair to them, and disruptive of the orderly process of Air Force operations, to require them to explain and justify actions taken several years ago. Plaintiff waited until it was too late in the day for a speedy, fair and exact determination of the truth.

For these reasons, defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied. The petition is dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 442-72

JAMES W. BRUNDAGE

v.

THE UNITED STATES

Before NICHOLS, *Judge,* Presiding, DURFEE, *Senior Judge,* and KASHIWA, *Judge.*

Order

This case comes before the court on plaintiff's motion, filed November 22, 1974, for rehearing pursuant to Rule 151 and suggestion for rehearing *en banc* pursuant to Rule 7(d). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151,

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

/s/ PHILIP NICHOLS, JR.
Philip Nichols, Jr.
Judge, Presiding

Jan. 10, 1975

206 Ct.Cl. .... (1975)

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 442-72

JAMES W. BRUNDAGE

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges,* sitting *En Banc.*

Order

This case comes before the court on the motion of the Bar Association of the District of Columbia for leave to file a brief Amicus Curiae, for waiver of the provisions of Rule 151(b), for an extension of time to file the Amicus Curiae brief, and for leave to present oral argument. Upon consideration of the motion and defendant's opposition thereto,

IT IS HEREBY ORDERED that the motion is denied on the ground that it was filed too late in the proceedings in this case.

BY THE COURT

/s/ WILSON COWEN
Wilson Cowen
Chief Judge

Jan. 10, 1975

The Chief Judge and Judge Bennett would allow the motion.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1244

JAMES W. BRUNDAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the Court of Claims' holding that his suit was barred by laches.

1. On July 8, 1968, petitioner was chosen for promotion to the grade of temporary Major in the Air Force. On August 5, 1968, another selection board considered, but did not select, petitioner for promotion to the grade of permanent Major. Because this was petitioner's second deferral of permanent promotion,[1] he was discharged as required by 10 U.S.C. 8303.

Prior to his discharge, petitioner applied to the Air Force Board for the Correction of Military Records on October 11, 1968. He sought to have the August 5, 1968, non-selection expunged from his record, alleging that due to administrative error the selection board had not been apprised of his earlier promotion to temporary Major.

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[1]Petitioner previously had been passed over for promotion on November 19, 1966.

The Board denied the application on November 19, 1968, stating that petitioner had failed to establish probable error or injustice. On March 31, 1969, petitioner was discharged (Pet. App. 1a-2a).

On December 8, 1972, more than three years and eight months after his discharge, petitioner filed suit in the Court of Claims. He again sought an order directing the Air Force to amend its records to show that he was promoted to permanent Major. He also requested active duty pay from the date of his discharge. On January 26, 1973, petitioner asked the court to suspend proceedings while he reapplied to the Board. On August 6, 1973, the Board denied his application for reconsideration. On the government's motion for summary judgment, the Court of Claims dismissed petitioner's suit, holding that it was time-barred because of laches (Pet. App. 1a-10a).

The court concluded that the two requisites of laches—unreasonable delay in the assertion of a right, and prejudice to the defendant because of the delay—were present here. The court found that petitioner "unreasonably and inexcusably delayed for a period of three years and eight months before asserting his rights in the commencement of this litigation" (Pet. App. 8a), and the delay prejudiced the government in several respects. First, the court observed, even if no one was selected to replace petitioner his recovery here "would require the Government to pay him the salary of a Major for a period of over five and a half years, during which time no work was done, and during which time he had ample opportunity to fully assert his claim" (Pet.

App. 8a-9a; footnote omitted).[2] The court also concluded that the government's defense would have been hampered. Petitioner's theory depended on an assertion that the Permanent Major Board was unaware of the action of the Temporary Major Board. Colonel Worthington, who made a record notation to the contrary at the time promotion was denied, had by 1973 lost all memory of the events. If petitioner had brought suit earlier, Colonel Worthington's memory might have been preserved (Pet. App. 9a). So, too, a critical document that might have established or refuted petitioner's claim had been routinely destroyed (*ibid.*). Consequently, the court concluded that petitioner had "waited until it was too late in the day for a speedy, fair and exact determination of the truth" (Pet. App. 10a).

2. The Court of Claims' decision involves only the application of settled principles to particular facts, and presents no question warranting review by the Court.

Petitioner contends that laches should not have been applied to his case because the doctrine had been "forgotten or abandoned" in military pay cases for almost fifty years prior to *Cason* v. *United States*, 461 F.2d 784 (Ct. Cl.) ("*Cason I*"), and that petitioner relied

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[2]The Court of Claims properly discounted petitioner's claim (Pet. 4-5) that laches should not be applied to a layman. All litigants are under an obligation to vindicate their rights in a fashion that does not disadvantage their adversaries. Petitioner's claim was one which, if vindicated, would produce an ample fund out of which to reimburse counsel; petitioner has not alleged that he was unable to afford counsel, and he in fact retained counsel in May 1971, one year and seven months before he filed the instant suit. Finally, this is not a case in which a layman was ignorant of the alleged wrong done him or the possibility of redress. Petitioner sought relief even before he was discharged, and has offered no explanation other than neglect for his failure to commence judicial proceedings.

upon "the existing practice that laches did not apply to military pay cases" (Pet. 5-7). Petitioner also maintains that the Court of Claims made "due allowance" for such reliance in *Cason* v. *United States*, 471 F.2d 1225 (Ct. Cl.) ("*Cason II*"), and should have accorded him similar treatment (Pet. 6-7, 10).

These contentions were not raised below. Petitioner expressly conceded in the Court of Claims that laches is applicable to military pay cases (Pet. App. 5a). Accordingly, review of those contentions by this Court is inappropriate. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the Court of Claims properly applied the doctrine of laches to petitioner's claim.

a. As petitioner recognizes, the Court of Claims applied the doctrine of laches to military pay cases in reported decisions in 1923 and 1928. *Plunkett* v. *United States*, 58 Ct. Cl. 359; *Chamberlain* v. *United States*, 66 Ct. Cl. 317, certiorari denied, 279 U.S. 845. Numerous Court of Claims cases later invoked laches where plaintiffs sought back pay or reinstatement because of illegal discharge from civilian Federal service. See, *e.g.*, *Grisham* v. *United States*, 392 F.2d 980 (Ct. Cl.), certiorari denied, 393 U.S. 843; *Jackson* v. *United States*, 179 Ct. Cl. 29, certiorari denied, 389 U.S. 985; *Alpert* v. *United States*, 161 Ct. Cl. 810. Although in recent years preceding *Cason I* the Court of Claims had no occasion to apply laches to a military pay case, it did not intimate that laches would *not* continue to be applicable, when appropriate, in such cases. *Cason I* reaffirmed the longstanding practice and did not change the law. Applying the *Cason I* principles here, the Court of Claims properly concluded that laches was applicable in view of petitioner's lengthy delay in

filing suit and the substantial and demonstrable prejudice the delay caused.[3]

b. Petitioner's claim that the Court of Claims should have declined to apply laches in his case, as it declined to apply laches on reconsideration in *Cason II*, is unpersuasive. The reconsideration of that case was explained by the Court of Claims on several grounds, none of which is applicable here. Contrary to petitioner's assertion (Pet. 6, 10), rehearing was granted in *Cason II* not because *Cason I* was "revolutionary," but because of "the possible unfairness to plaintiff's position" due to the fact that one of his legal memoranda "was never distributed to the judges of this court" (471 F.2d at 1226). The *Cason II* court also concluded that laches had not been established because the government "has made no attempt to substantiate that it was in fact in any specific manner prejudiced by plaintiff's delay" (*id.* at 1229). The court held that "[w]ith a minimal showing of injury," plaintiff's delay "would have mandated application of laches except for the desuetude factor" (*id.* at 1230).

In the instant case, the court fully considered the principles enunciated in *Cason II* (Pet. App. 4a-8a), but held that, in contrast to *Cason II*, petitioner's inaction here specifically prejudiced the government in a number of concrete ways. This disposition was sanctioned by the

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[3]Petitioner also asserts that the doctrine of laches contravenes the statute of limitations and that it must be treated with great caution (Pet. 7). But a statute of limitations is merely the outer limit within which a suit may be brought, and it is well established that laches may bar an action even though it was brought within the statute of limitations. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392.

principles of *Cason II* and fully within the discretion of the Court of Claims.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]Petitioner's final contention—that the court erred in denying his application for an *en banc* hearing (Pet. 10)—is not an appropriate ground upon which to seek certiorari. The grant of a rehearing *en banc* under Court of Claims Rule 7(b) is discretionary, and only the Court of Claims can determine when such extraordinary action is necessary. See *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 624-625.